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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND RULE  
31.15(b), ARIZONA RULES OF  
CRIMINAL PROCEDURE

Supreme Court No. R-10-0005

**Comment of the State Bar of  
Arizona on Petition to Amend  
Rule 31.15(b), Arizona Rules of  
Criminal Procedure**

The State Bar of Arizona respectfully opposes the petition to amend Arizona Rule of Criminal Procedure 31.15(b), which seeks to conform Criminal Rule 31.15(b) to the statute, A.R.S. § 13-4039. It is the State Bar's position that conformity with A.R.S. § 13-4039 would not be accomplished by this petition. The rule, as modified, would provide that the court "may" dismiss an appeal in certain circumstances, with notice to the defendant, except in capital cases. The statute provides that the appellate court "shall" dismiss the appeal under the same circumstances.

The petition does not make clear its intent with respect to the discrepancy existing between the rule with the proposed modification and the statute. When in conflict with a statute, the rules of procedure always govern, as the legislature may not usurp the rule-making authority of the Arizona Supreme Court. Statutory procedures adopted by the legislature which are inconsistent with procedural rules adopted by the Supreme Court have been held unconstitutional. *State v. Jackson*, 184 Ariz. 296, 908 P.2d 1081 (App.

1 1995); *State v. Fowler*, 156 Ariz. 408, 752 P.2d 497 (App. 1987); *State v.*  
2 *Bejarano*, 158 Ariz. 253, 762 P.2d 540 (1988) (en banc); *Daou v. Harris*, 139  
3 Ariz. 353, 678 P.2d 934 (1984). When a statute conflicts with a rule of  
4 procedure, the rule controls as to procedural matters. *See, e.g., Pompa v.*  
5 *Superior Court*, 187 Ariz. 531, 931 P.2d 431 (App. 1997) (statute  
6 impermissibly conflicts with rule by imposing a procedural “jurisdictional  
7 requirement” not contemplated by the Supreme Court); *State v. Fowler, supra*  
8 (statute must yield to court rule governing procedural matter); *State ex rel.*  
9 *Conway v. Superior Court*, 60 Ariz. 69, 131 P.2d 983 (1942) (court rule  
10 prevails over legislative rule that unduly hampers court in administering  
11 justice); *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987) (same).

12 The proposed modification is also problematic in that oftentimes the  
13 failure to perfect the appeal is not the fault of the defendant, but rather is due to  
14 the superior court’s failure to update its records when there is a change of  
15 counsel from trial to appeal.

16 The State Bar of Arizona believes that the rule in its current form  
17 preserves a defendant's right to direct appeal; and, where the record is  
18 sufficient to enable the appellate court to decide the appeal on its merits, the  
19 appeal should not be dismissed.

20 The State Bar of Arizona is concerned that the modification would give  
21 rise to constitutional and/or procedural concerns (such as a defendant's absolute  
22 right to appeal) and would have adverse effects thereon.

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2 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of May, 2010.

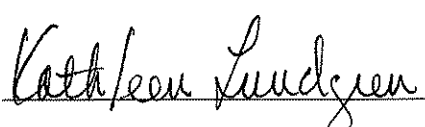
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5 John A. Furlong  
6 General Counsel

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8 Electronic copy filed with the  
9 Clerk of the Supreme Court of  
10 Arizona this 11<sup>th</sup> day of May, 2010.

11 And a copy was mailed to:

12 Ellen M. Crowley, Esquire  
13 Chief Staff Attorney  
14 Arizona Supreme Court  
15 1500 W. Washington Street, Ste. 445  
16 Phoenix, Arizona 85007

17 this 11<sup>th</sup> day of May, 2010.

18 By:   
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